Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2021-000180-001 DT 09/17/2021

HONORABLE JOHN R. HANNAH JR

CLERK OF THE COURT
A. Walker
Deputy

PHOENIX NEWSPAPERS INC
KATHY TULUMELLO

DAVID JEREMY BODNEY

v.

ARIZONA STATE SENATE (001)
KAREN FANN (001)
WARREN PETERSEN (001)
SUSAN ACEVES (001)
CYBER NINJAS INC (001)

THOMAS J. BASILE
JOHN DOUGLAS WILENCHIK

KORY A LANGHOFER
COURT ADMIN-CIVIL-ARB DESK
DOCKET-CIVIL-CCC
JUDGE HANNAH
REMAND DESK-LCA-CCC

MINUTE ENTRY

The Order to Produce Public Records filed August 24, 2021 (the "Order") directed the parties to move forward in this case, a special action pursuant to A.R.S. section 39-121 *et seq.* (the "Public Records Law") in which petitioner Phoenix Newspapers, Inc., *et al.* (PNI) seeks access to records in the possession of the Arizona State Senate and its officials (the Senate) and Cyber Ninjas, Inc. (the Ninjas). The Order promised an explanation of the Court's reasoning. That explanation follows. Because the decision in *Fann v. Kemp*, No. 1 CA-SA 21-0141, 2021 WL 3674157 (Ariz. App. August 19, 2021) has become final since the issuance of the Order, the explanation will focus on the reasons that the Ninjas are a proper party to the case.

The Order was not entirely clear about what has been decided and what may be raised in future proceedings. Though both defendants have special action petitions pending in the Court of Appeals, in Cyber Ninjas v. Hannah, Nos. 1 CA-SA 21-0173 and 1 CA-SA 21-0176 (consolidated), the superior court retains jurisdiction absent an active stay order. *Coffee v. Ryan-Touhill*, 247 Ariz. 68 ¶¶14-15, 445 P.3d 666 (App. 2019). The only stay that this Court is aware of, at this writing, applies to the provisions of the Order that (1) set deadlines for disclosure of records not in the Senate's physical possession and (2) require the Cyber Ninjas to produce records directly to PNI. Order Granting Stay in Nos. 1 CA-SA 21-0173 and 1 CA-SA 21-0176 (consolidated), filed Sept. 16, 2021. The Court is willing to entertain requests to modify other provisions of the Order, including provisions that the defendant have challenged for the first time in the Court of Appeals (concerning, for example, *in camera* review of records).

On the other hand, the Court welcomes guidance from the Court of Appeals that might avert additional delays caused by piecemeal litigation. Though the Court respects the need for careful consideration of the legal rights of all parties, the Court also submits that the "prompt compliance" requirement of A.R.S. section 39-121.01(E) militates against allowing a public records holder to play out its legal arguments and then, if unsuccessful, to begin the process of responding to the substance of a disclosure request. The impending release of the audit report makes prompt compliance even more urgent that it was when the Order was issued. Time is now truly of the essence.

THE LAW ALLOWS PNI TO JOIN THE NINJAS AS A PARTY

Asking to be dismissed from the case, the Ninjas argue that the Public Records Law does not permit a cause of action against them. To the extent that their argument mirrors the Senate's argument that the Public Records Law does not apply to records not in the Senate's physical possession, the Court of Appeals has rejected it. The question here is whether PNI has the right to ask the courts to compel the Ninjas to disclose public records in their possession, as opposed to asking for an order that directs the Senate to obtain the records from the Ninjas and then to disclose them. The Court holds, for two separate and independent reasons, that PNI does have that right.

First, under the unique circumstances of this case the Ninjas are a "public officer" within the plain meaning of the Public Records Law. "Officer' means any person . . . appointed to hold any office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body." A.R.S. § 39-121.01(A)(1). "Person' includes a corporation, company, partnership, firm, association or society, as well as a natural person." A.R.S. § 1-215(29). "Public body' means . . . any public organization or agency, supported in whole or in part by monies from this state or any political subdivision of this state, or expending monies provided by this state or any political subdivision of this state." § 39-121.01(A)(2).

The Ninjas have been "appointed" by the Senate as the "head" of the "public organization" conducting what the Ninjas describe as an "ongoing investigation of how [Maricopa County] conducted [the 2020] election." Response to Application for Order to Show Cause at 4. The Senate is exercising its official powers in support of the audit organization by (among other things) issuing subpoenas to the County. *Id.* The Senate is also partly funding the audit with public monies, which makes the audit organization a "public body" for purposes of the statute. The Ninjas are a "person" because they are a corporation. The Ninjas are therefore an "officer" with responsibility (alongside the Senate) for maintaining and disclosing public records relating to the audit. It follows that PNI may file an action against the Ninjas, under section 39-121.02(A), appealing the denial of PNI's request for audit-related public records.

Second, the Ninjas have the obligations that the Public Records Law assigns to a "custodian" of public records. The relevant provision expressly commands persons seeking public records to direct their requests to the "custodian" of the records. A.R.S. § 39-121.02(D). The "custodian" is responsible for collecting the required fees from the requestor, and for screening out requests made for commercial purposes. A.R.S. § 39-121.03. A request is deemed denied if the "custodian" fails to respond promptly. A.R.S. § 39-121.02(E). In the event of a denial, the requesting party has a judicial remedy through a special action like this one. A.R.S. § 39-121.02(A). This Court holds that section 39-121.02(A) permits the requestor -- here, PNI -- to name the custodian -- the Ninjas -- as a defendant in the action.

Section 39-121.02(A) says that a person whose public records request has been denied "may appeal the denial through a special action in the superior court, pursuant to the rules of procedure for special actions against the officer or public body." The Ninjas argue that the quoted language authorizes a special action against "the officer or public body" only. That reading violates Arizona's statutory construction rules.

Arizona recognizes the "last antecedent" rule of statutory construction. The "last antecedent" rule requires a court interpreting a statute to apply a qualifying phrase to the word or phrase immediately preceding as long as there is no contrary intent indicated. *Pawn 1st, L.L.C. v. City of Phoenix*, 231 Ariz. 309 ¶ 16, 294 P.3d 147 (App. 2013). Applying the last antecedent rule here, the phrase "against the officer or public body" must be read to modify "rules of procedure for special actions," not (as the Ninjas would have it) "special action in the superior court." Thus the statute requires the requestor to pursue the appeal "pursuant to the rules of procedure for special actions against [an] officer or public body."

PNI has framed this case in accordance with the rules of procedure for special actions. The special action rules permit the addition of parties as necessary for the plaintiff to obtain complete relief. *Arpaio v. Citizen Pub. Co.*, 221 Ariz. 130 ¶ 10 n. 4, 211 P.3d 8 (App. 2008); *see* Ariz. R. Special Action Proc, 2(b) (court may order joinder as parties of persons other than the body,

officer, or person against whom relief is sought). PNI's complaint alleges that the Ninjas are *both* "an officer or public body" with a statutory responsibility for maintaining and disclosing public records, *and* a "custodian" that has effectively denied PNI's request for disclosure of the records at issue. That framing is consistent with the special action rules and, therefore, with section 39-121.02(A).

Arpaio v. Citizen Pub. Co. supports PNI's position. In *Arpaio*, as here, the issue was the application of section 39-121.02 to a "third party" to a public records dispute. 221 Ariz. 130 ¶ 12. As here, the "third party" (an intervenor who had objected to the release of the records) argued that the legislature intended to limit the application of section 39-121.02's relevant provision (subsection (B), authorizing an award of attorneys' fees to a prevailing requestor) to "the officer or public body responsible for providing access to the public records." *Id.*, ¶ 10. Based on the text and history of the Public Records Law, the Court of Appeals refused to read that limitation into the statute, and upheld the fee award against the third party intervenor. This Court likewise rejects the Ninjas' attempt to avoid involvement by reading a non-existent limitation into section 39-121.02.

Subsection (C) of section 39-121.02, which creates an action for damages, also supports PNI's interpretation of subsection (A). Subsection (C) says, "[a]ny person who is wrongfully denied access to public records pursuant to this article has a cause of action against the officer or public body for any damages resulting from the denial." In that provision, unlike in subsection (A), the phrase "against the officer or public body" modifies "cause of action." Thus subsection (C) authorizes a cause of action for damages only against the "officer or public body" responsible for deciding whether to allow access to the records, not against a custodian that may simply be following the officer's directions.

Disallowing damages lawsuits against the records custodian makes perfect sense as a matter of policy -- just as it makes sense as a matter of policy, when the action seeks only access to the records, to allow the custodian to be made a party to the action. The Ninjas vehemently argue the other side of this policy question, but nothing in the statute suggests that the policymakers who wrote the statute saw it their way. To put it in terms of the "last antecedent" statutory construction rule, "there is no contrary intent indicated" anywhere in the statute. *Pawn 1st, L.L.C. v. City of Phoenix*, 231 Ariz. 309 ¶ 16, 294 P.3d 147. The statute therefore must be interpreted, by its terms, to permit PNI to make the Ninjas a party to this action.

Viewed through the public interest end of the policy lens, a construction of the Public Records Law that disallows direct enforcement against a records custodian contradicts the purpose of the law and the Court of Appeals holding in *Fann v. Kemp*. *Fann v. Kemp* forecloses the Senate's argument that it has no obligation to ask the Ninjas to cooperate with PNI's public records request, but it may leave open the question whether the Senate can compel the Ninjas to cooperate.

The Senate's contractual right to obtain records from the Ninjas has been a subject of debate throughout this case. The Ninjas, in turn, may think they lack authority to obtain records from audit subcontractors. In addition, the Ninjas are likely to disagree with the Senate on questions whether specific documents are public records, since whether a particular document has "a substantial nexus" to the audit depends on "the nature and purpose" of that document. *Fann v. Kemp*, 2021 WL 3674157 ¶ 18. If the Ninjas are not a party to the litigation, PNI will have no reliable way even to know about issues like those, let alone to bring them to court for resolution in a way that complies with the Public Records Law, unless the Senate chooses to take a position adverse to the Ninjas and asks for judicial intervention.

This will not do. *Fann v. Kemp* makes clear that the Public Records Law makes the courts, not the legislature, the final arbiters of this public records disclosure dispute. If the Ninjas are beyond the courts' authority, the Senate will effectively remain in a position to decide which of the records in the Ninjas' possession are public records – precisely where *Fann v. Kemp* says the Senate should not be. Thus far the Senate has not been inclined to disclose audit-related records to the public on any terms other than its own. Even if the Senate were to change course, by aggressively demanding compliance from the Ninjas, the Senate would have no way to enforce its demands without doing what PNI has already done: making the Ninjas a party to the litigation. The same goes for any order that the courts might direct to the Senate attempting to secure the Ninjas' compliance.

The Ninjas' participation as a party does not derogate the Senate's right to oppose disclosure of specific records based on exceptions to the statutory disclosure obligation or privileges like attorney-client privilege. The existing Order to Produce Public Records invites the Senate and the Ninjas to "confer regarding which Public Records in the possession, custody or control of one Defendant or another should be withheld on the basis of a purported privilege or for any other reason." Order at 4. If the parties have a better plan for facilitating cooperation to ensure that all parties are heard, the Court remains open to suggestions. But procedural problems created by multiple record holders are not a reason to compromise the public's right to know what its government is up to.

For all of those reasons, the Order affirms PNI's right to insist on keeping the Ninjas a party to this case.

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